No. 901

APR 25 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

BENJAMIN SCHER,

Petitioner

vs.

SINCLAIR WEEKS,
SECRETARY OF COMMERCE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable The Chief Justice and the Associate Justices of The Supreme Court of the United States:

BENJAMIN SCHER, petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in this case.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit decided January 19, 1956, appears as the Appendix hereto. Petitioner, then appellant, did not request a rehearing in said Court. Said case has not been included in the official records whereby decisions of said Court are reported. Memorandum of

Opinion, the Findings of Fact and Conclusions of Law, and the Judgment of the Trial Judge of the United States District Court for the District of Columbia who heard this case in said Court are set forth herein on pages 33 to 36 of the Joint Appendix, nine copies of which have been filed in this Honorable Court. Said documents have not been officially reported.

Jurisdiction

The jurisdiction of this Honorable Court to hear and determine this case is based upon Title 28, Section 1254 (1) of the U.S. Code.

STATEMENT OF THE MATTER INVOLVED

Petitioner was summarily dismissed from his employment as a GS-9, Office of Technical Services, Department of Commerce, by the respondent effective April 3, 1953, pursuant to the so-called "rider" to the then Appropriation Act, which said provision of law is Section 304 of the Department of Commerce Appropriation Act, 1953, Act of July 10, 1952, 66 Stat. 549, 567 and is as follows:

> "Notwithstanding the provisions of Section 6 of the Act of August 24, 1912 (37 Stat. 555) or the provisions of any other law, the Secretary of Commerce may in his absolute discretion during the current fiscal year terminate the employment of any officer or employee of the Department of Commerce whenever he shall deem such termination necessary or advisable in the best interest of the United States."

During 1944 and again during 1948, petitioner had undergone hearings to determine whether or not he was eligible for employment in the Executive Branch of our Government as a matter of loyalty, and in both instances he was cleared. Transcripts of said loyalty hearings were introduced into evidence in the trial in the United States District Court for the District of Columbia. Dur-

ing 1950, while petitioner was an employee of the Department of Commerce, the question of a Security Clearance for him first became an issue and the testimony regarding conference between petitioner, his immediate superior, and the Security Officer of the Department of Commerce, at which time the petitioner was belittled but promised that he would *not* be fired without a hearing was introduced in the trial of this case in the United States District Court for the District of Columbia. Testimony regarding said conference is set forth on pages 45 through 48 of the Joint Appendix filed in the United States Circuit Court for the District of Columbia Circuit, nine copies of which have been filed in this Honorable Court, same constituting "Brief for Appellant and Joint Appendix." References to said conference were also made in the testimony of Colonel Newman Smith, the Security Officer for the Department of Commerce, as set forth on pages 69 through 72 of said Joint Appendix. During late 1952, petitioner was given a so-called "desk audit," to determine his eligibility for promotion as an employee of the Department of Commerce, the result of which was that petitioner was found to have been eligible for promotion.

There was no showing whatsoever in the trial in the United States District Court for the District of Columbia to the effect that it was "necessary or desirable in the best interest of the United States" for respondent to have summarily discharged petitioner. Nevertheless, respondent did invoke the monarchial powers which he considered he possessed, pursuant to aforesaid statutory provisions, and effected such dismissal.

It is the contention of the petitioner and it is respectfully submitted that a study of testimony presented in the Court below will satisfy the Honorable Chief Justice and the Honorable Associate Justices of this Court that the respondent acted in a high-handed manner; that the re-

spondent exemplified a very cold and heartless attitude; and that the action of the respondent, as aforesaid, was so arbitrary and unreasonable, as to constitute an abuse of the discretion in him reposed.

The point has also been made in the Courts below to the effect that the Statute in question gave such sweeping power to the Secretary of Commerce as to have been repugnant to all laws governing the employee-employer relationship within our Government. On that basis said law, had it not already expired, would be subject to perusal for constitutionality. The proper interpretation of said law is a matter of considerable concern in that, it is respectfully submitted, the Secretary of Commerce should have had some basis for deeming the firing of an employee necessary or advisable in the best interest of the United States rather than merely to discharge summarily an individual employee and say no more than that, in his opinion, he deemed such firing to be necessary or advisable in the best interests of the United States, without giving or apparently having any reason therefor. The jurisdiction of the United States District Court for the District of Columbia to hear and determine the case based upon the "Complaint in the Nature of Mandamus, or for Mandatory Injunction or Declaratory Judgment," was by virtue of Section 11-306 of the District of Columbia Code, 1951 Edition and Section 1651 of Title 28 of the United States Code.

Questions Presented

The question is whether the courts below erred in refusing relief to petitioner upon abundant and uncontradicted proof that the respondent, in discharging petitioner from petitioner's employment under authority of a rider to an appropriation law, acted in such an arbi-

trary and unreasonable manner as to abuse the discretion in him (respondent) reposed, and when such action by respondent was without reason which would cause same to be "necessary or advisable in the best interests of the United States."

The question is whether or not there should be uniformity among Federal Courts with regard to the granting of relief in cases in which heads of government departments have fired employees and, in so doing, have failed to comply with "elementary standards of fairness."

Reasons for the Allowance of the Writ

It is understood that a review of any case by this Honorable Court on a Writ of Certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor. It is further understood that this Honorable Court is primarily interested in invoking the jurisdiction of this Honorable Court for the purpose of hearing those cases which involve a Federal Question of a substantial nature. It is believed that this Honorable Court is particularly interested in cases involving the removal of an employee of our Federal Government for alleged cause or lack thereof and more particularly employees within the Classified Civil Service. It is also believed that this Honorable Court is particularly concerned where there is a serious inconsistency in the letter and spirit of the decisions of subordinate Federal Courts.

The special and important reasons involved in this case are that petitioner was given no opportunity whatsoever to prove that he was not a security risk; that petitioner had proven that he was not a loyalty risk; that petitioner had sought a hearing for the purpose of clarifying his security status for a period of more than two years next preceding his having been summarily dis-

charged by respondent; that petitioner's security case came to the attention of respondent by reason of petitioner's having established his eligibility for promotion; that respondent took no personal interest in petitioner whatsoever and proceeded to summarily discharge petitioner just a few weeks before the so-called "Eisenhower Security Program", which is the well-known Executive Order 10450, went into effect; that the very purpose of the above noted rider to the appropriations law under which petitioner was fired, namely the immediate dismissal of subversives and perverts, was disregarded by the respondent in firing the petitioner, in that there is no showing, and most assuredly it could never be said that there is anything morally wrong with petitioner, and in that petitioner had, as pointed out hereinabove, made such a sincere effort to clarify his security status over so long a period. As a combination of all of the above-named factors, the charge has been made in the Courts below that the respondent acted in such an arbitrary and unreasonable manner as to abuse the discretion in him reposed and failed to comply with elementary standards of fairness. Neither of the Courts below has clarified the question of whether or not a Federal Court will give relief where such charge is alleged and proven.

It is respectfully submitted that a reading of the record of the trial in the United States District Court for the District of Columbia as set forth on pages 38 through 91 of the Joint Appendix, nine copies of which have been filed in this Honorable Court, will completely satisfy the Honorable Chief Justice and the Honorable Associate Justices of this Court that such charge against respondent was duly proven at trial. It is significant that there was no defense although full opportunity to present same was available. The respondent relied completely upon

what he believed to have been his monarchial powers under the above quoted rider to the Appropriations Law, which was in full force and effect at the time when petitioner was fired.

It is respectfully submitted that the issue of whether or not Federal Courts will grant relief to former Government employees who allege and prove that they were summarily discharged by such arbitrary and capricious action on the part of the head of a department of the Executive Branch of our Government as to abuse the discretion in him reposed, does constitute a Federal Question of a substantial nature. Furthermore, where a statute gives to the head of a Government Department the power to discharge an employee whenever the head of the Government department deems same "necessary or advisable in the interests of the United States" the interpretation of said statute becomes a Federal Question of a substantial nature. The obvious interpretation of said statute by respondent was that he need have no *reason* for deeming such discharge to be so necessary or advisable, but that his own opinion, unsupported by reason, was sufficient. From the outset, it has been the contention of petitioner that there was no reason for the discharge of petitioner, and that it was an improper, incorrect, and inaccurate interpretation of the statute for respondent to have summarily discharged petitioner without good reason which would bring such discharging within the statute.

It is significant that petitioner was a member of the Classified Civil Service. Petitioner testified to the effect that his promotion would not have necessitated such a change of assignment as to have required that he deal in classified material or information, but that promotion by virtue of a desk audit constituted a mere upgrading of work already being done. Such testimony is set forth on Page 90 of above referred to Joint Appendix. The personnel expert from the Department of Commerce sup-

ported such testimony, as set forth on Pages 87 and 88 of said Joint Appendix. The gist of the testimony from the Security Officer from the Department of Commerce, however, was to the effect that such eligibility for promotion must have contemplated the inclusion of security information and material in the new proposed rating. Such testimony is set forth on pages 82 and 83 of said Joint Appendix. The question below was one of reliability of evidence and in neither decision did either Court below express any concern for the possibility that had respondent been promoted, he might have been given work of a different nature to do.

It is respectfully submitted that the undenied fact that there was a tie-in between the eligibility for promotion and the summary discharge merely aggravates the coldness and heartlessness of such discharge. There can be little doubt but that had petitioner remained silent and not asked for a desk audit for promotion purposes, his case, together with all others, would have become the subject of consideration under the above referred to "Eisenhower Security Program," wherein he would have been given some rights to defend himself against the charge of allegedly being a so-called "Security Risk."

The Court of Claims has rendered some very powerful decisions with regard to findings of Heads of Government Departments, which were motivated by malice, which were arbitrary or capricious, or which were rendered in bad faith.

The leading case is that of *Gadsden* v. *U. S.* 111 Court of Claims 489. Whenever the decisions of this Honorable Court in the cases of *Philadelphia Company* v. *Henry L. Stimson*, 223 U.S. 604, *Lloyd Sabande Societa Anonima Per Azione* v. *Elting, Collector of Customs*, 287 U.S. 329, and *Dismuke* v. *United States*, 297 U.S. 167 may be quoted in Courts below in support of the proposition

that the Courts should take jurisdiction and grant relief in cases in which an employee of the Federal Government has been summarily discharged by action on the part of the head of a Government Department which is arbitrary and capricious to such an extent as to abuse the discretion in him (the secretary) reposed, by counsel for a former employee of the Government, who has been discharged under circumstances which do not satisfy elementary standards of fair play, he is met with an entirely different line of cases in which the proof has been to the effect that employees were so immoral, lazy or stupid that they should have been discharged.

It is respectfully submitted, therefore, that the variance between the position of the Court of Claims and the decisions of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit on said important point is so great as to constitute, in and of itself, good and sufficient reason for the granting of the Writ of Certiorari.

It is doubted that any brief could elaborate on the arguments hereinabove given as the reasons for the granting of the Writ of Certiorari, without being unnecessarily repetitious. It is most earnestly requested that the Writ should issue so that this most important case involving the employer-employee relationship within our Federal Government may be argued and finally determined by this Honorable Court rather than to leave the above referred to important questions answered only by The Memorandum of Opinion, the Findings of Fact and Conclusions of Law, the Judgment of the Trial Court, and the Opinion of the United States Court of Appeals for the District of Columbia Circuit. It is sincerely believed that this Honorable Court, upon such argument, will completely reverse the decisions of the Courts below

and will write an Opinion which will serve from this time forth as a "check-rein" upon arbitrariness on the part of the head of a Government Department in dealing with his subordinates, regardless of whether or not the question of security is involved.

Dated April , 1956.

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Washington, D. C.

APPENDIX

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 12827

Benjamin Scher, Appellant

v.

Sinclair Weeks, Secretary of Commerce, Appellee

Appeal from the United States District Court
for the District of Columbia

Decided January 19, 1956

Mr. *Ford E. Young, Jr.*, with whom Mr. *Josiah Lyman* was on the brief, for appellant.

Mr. *Benjamin Forman*, Attorney, Department of Justice, with whom Messrs. *Leo A. Rover*, United States Attorney, and *Samuel D. Slade*, Attorney, Department of Justice, were on the brief, for appellee. Mr. *Lewis Carroll*, Assistant United States, also entered an appearance for appellee.

Before *Fahy, Danaher and Bastian*, Circuit Judges.

Per Curiam: Appellant, who was a civil service employee of the Department of Commerce, was discharged by the appellee, Secretary of Commerce, under the authority of section 304 of Public Law 495, 82d Congress, 66 Stat. 549, 567 (1952). This statute, no longer in effect, authorized the Secretary to terminate employment of any officer or employee of the Department, "whenever

he shall deem such termination necessary or advisable in the best interests of the United States."

In the District Court appellant sought a decree holding the statute to be unconstitutional, declaring his removal illegal in any event, and requiring the Secretary to reinstate him. The District Court, after hearing, found that appellant was discharged upon a determination by the Secretary, acting pursuant to the statute, that in his absolute discretion he deemed it advisable in the best interests of the United States.[1] Judgment was entered for the Secretary.

The constitutionality of the statute is upheld by the reasoning of this Court in *Bailey* v. *Richardson*, 86 U. S. App. D. C. 248, 182 F. 2d 46, *affirmed by an equally divided court*, 341 U.S. 918.[2] And since the Secretary complied with the statute the judgment must be

AFFIRMED..

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[1] The Court also concluded that the evidence did not support appellant's contention that the Secretary acted in an arbitrary or unreasonable manner.

[2] It should be noted, however, that in the case at bar appellant's discharge carries no implication that he might be either disloyal or a security risk.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 901

BENJAMIN SCHER, PETITIONER

v.

SINCLAIR WEEKS, SECRETARY OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals has not been officially reported but is set out as an appendix to the petition. The memorandum opinion of the district court (J.A. 33-34)[1] is not reported.

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[1] References to the Joint Appendix filed in the court of appeals will be indicated by "J.A. —." References to the Petition will be indicated by "Pet. —."

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1956 (Pet. App. 11). The time for filing a petition for a writ of certiorari was extended to April 25, 1956, by an order of the Chief Justice dated April 16, 1956. The petition for a writ of certiorari was filed on April 25, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 304 of Public Law 495 of the 82nd Congress authorized the Secretary of Commerce to dismiss petitioner summarily without an opportunity for petitioner to be heard.

2. Whether Section 304, which expired by its own terms in 1953, was constitutional.

3. Whether this Court or the courts below have jurisdiction to review the action of the Secretary of Commerce, taken "in his absolute discretion" pursuant to Section 304, in terminating the employment of petitioner following the Secretary's determination that he deemed such termination "necessary or advisable in the best interest of the United States."

STATUTE INVOLVED

Section 304 of Public Law 495 of the 82nd Congress (Department of Commerce Appropriation Act, 1953, Act of July 10, 1952, 66 Stat. 549, 567) reads as follows:

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555),

or the provisions of any other law, the Secretary of Commerce may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of Commerce whenever he shall deem such termination necessary or advisable in the best interests of the United States.

STATEMENT

Petitioner, a former civil servant whose employment was terminated in April 1953 pursuant to Section 304 of Public Law 495 of the 82nd Congress (66 Stat. 549, 567), seeks to set aside his discharge as "arbitrary and unreasonable." At the time of his discharge he was employed as a GS-9 in the Office of Technical Services in the Department of Commerce (J.A. 9).

Pursuant to Executive Order 9835 (12 F.R. 1935), a loyalty proceeding was conducted in 1948 by the Loyalty Board of the Department of Commerce to determine whether reasonable grounds existed for believing that petitioner was disloyal to the Government of the United States (J.A. 34). A determination favorable to petitioner was made by the Board on December 31, 1948 (J.A. 8), and that determination was approved by the Loyalty Review Board in 1949 (J.A. 24-25).

Petitioner was not, however, granted security clearance (J.A. 3, Par. 7; 10-11, Par. 7; 34). Pursuant to the recommendation of the Department's Security Control Officer, petitioner's services were thereafter utilized in a position where he had no access to classified material (J.A. 25).

On March 16, 1953, the Security Control Officer addressed a memorandum to respondent, who had shortly before been appointed Secretary of Commerce, which stated as follows in pertinent part (S.J.A.):[2]

> In view of the record set forth in the summary memorandum [prepared for Secretary Sawyer on June 14, 1951], this office could not recommend Mr. Scher's employment if he were an applicant for a position with the Department today, nor could we recommend that he be cleared for access to classified information.
>
> Under the circumstances, it is recommended that Mr. Scher be offered an opportunity to resign; and if he does not do so, that he be terminated pursuant to the authority granted him [sic] under the current Appropriation Act, Section 304, Public Law 495 of the 82nd Congress.

On March 25, 1953, a committee comprised of Under Secretary of Commerce Williams and two other officials concurred in the recommendation (S.J.A.). These recommendations were approved by respondent on March 26, 1953 (S.J.A.; J.A. 31; 34-35). On April 3, 1953, after petitioner refused to resign (J.A. 58-59), his employment was terminated (J.A. 9; 35).

[2] This memorandum, Defendant's Exhibit D, is set forth at pages 25 to 26 of the Joint Appendix. As printed, however, the date of the memorandum and pertinent marginal handwritten comments were omitted. Accordingly, a photostat of the original was reproduced as a Supplement to the Joint Appendix and appears at page 93 of the Record.

It is stipulated that respondent did not confer with petitioner prior to petitioner's discharge and that respondent's decision to terminate petitioner's employment was based exclusively upon statements as to the facts made by, and upon recommendations of, respondent's subordinates (J.A. 37; 62). It is also stipulated (J.A. 62, 63) that if respondent were present in court he would testify, as deposed in his affidavit (J.A. 31), that:

> On March 26, 1953, in the exercise of my absolute discretion, pursuant to the provisions of Section 304 of Public Law 495, 82nd Congress, I decided to terminate the employment of Benjamin Scher by the Department of Commerce, deeming such termination necessary and advisable in the best interests of the United States, and thereupon directed all necessary steps to be taken to effect such termination as soon as practicable, if said employee did not resign.

Upon these facts, and upon the testimony introduced by petitioner at the trial with respect to his efforts to obtain a promotion and a change in his security status (J.A. 38-90), the district court entered judgment for respondent (J.A. 36). The court concluded that petitioner's discharge was authorized by Section 304, and that the evidence did not support petitioner's contention that respondent acted in an arbitrary or unreasonable manner (J.A. 34, 35). On appeal, the court of appeals affirmed, stating in its *per curiam* opinion

that Section 304 was constitutional and that respondent had complied with the statute.

ARGUMENT

Petitioner seeks to have this Court review and declare "arbitrary and unreasonable" the termination of petitioner's employment by the Secretary of Commerce acting pursuant to a temporary statute giving the Secretary "absolute discretion" to effect such termination "whenever he shall deem such termination necessary or advisable in the best interests of the United States." The court below followed well-established precedent in holding that the action complained of was lawful. Its decision is not in conflict with any other decision. And the statute involved expired in 1953. There is consequently no occasion for review by this Court.

1. Petitioner points to no rights of his, either constitutional or statutory, which have been invaded by respondent's action and which are subject to redress in a court of law. Thus, while complaining that he was summarily discharged without a hearing (Pet. 6, 7), petitioner neither makes an affirmative assertion of a right to such hearing nor cites any source from which such a procedural right might flow. The reason for this omission is apparent. At the time petitioner's employment was terminated, April 3, 1953, the right to be heard in connection with dismissal was conferred upon federal employees by three statutes: Section 6 of the Lloyd-LaFollette Act (Act

of August 24, 1912, 37 Stat. 555, 5 U.S.C. 652), Section 1 of the Act of August 26, 1950 (64 Stat. 476, 5 U.S.C. 22-1), and Section 14 of the Veterans Preference Act (Act of June 27, 1944, 58 Stat. 390, as amended, 5 U.S.C. 863).[3] But Section 304 of Public Law 495 of the 82nd Congress, under which petitioner was discharged, expressly withdrew the employee rights conferred by these prior statutes. In clear and unambiguous terms, Section 304 empowered the Secretary, for the duration of the then-current fiscal year, to discharge employees "[n]otwithstanding the provisions of [the Lloyd-LaFollette Act] or the provisions of any other law * * *." Emphasizing the breadth of this grant of authority, Section 304 further provided that the Secretary could exercise the power of dismissal "in his absolute discretion." The single limitation imposed by Section 304—and thus the sole statutory procedural "right"

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[3] The Lloyd-LaFollette Act requires that an employee be given notice of his proposed removal; a copy of the charges preferred against him; a reasonable time to file a written answer to the charges; and a written decision at the earliest practicable date.

Section 1 of the Act of August 26, 1950, authorizing the summary suspension of employees on security grounds, requires that an employee be given a written statement of the charges against him within thirty days after his suspension; an opportunity to file a written answer; a hearing; a review of his case by the agency head, or some official designated by him, before an adverse decision is made final; and a written statement of the decision of the agency head.

Since petitioner is not a veteran, the provisions of the Veterans Preference Act (Act of June 27, 1944, 58 Stat. 390, as amended, 5 U.S.C. 863) were never applicable to him.

which petitioner may claim—was that the Secretary "deem such termination necessary or advisable in the best interests of the United States." And it is undisputed that the Secretary made precisely that finding here (J.A. 31, 63).

2. Since petitioner clearly had no statutory rights which were violated by the action of respondent in this case, he must look to the Constitution to support his claim. Yet he cites no decision or other authority even suggesting that the Constitution forbids the discharge of a civil servant like petitioner without a hearing. On the contrary, it has long been settled that the tenure of such employees, unless fixed by statute, is subject to the will and discretion of the appointing authority. *Shurtleff* v. *United States*, 189 U.S. 311; *Crenshaw* v. *United States*, 134 U.S. 99; *Parsons* v. *United States*, 167 U.S. 324; *Matter of Hennen*, 13 Pet. 230. Cf. *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128, 133; *Myers* v. *United States*, 272 U.S. 52, 161. As the Court of Claims has pointed out, an employee who is not subject to the statutory protections made inapplicable by Section 304

> . . . may be discharged at the will of his employer, with or without cause. This has been recognized from the beginning of our government. It was to prevent this that the Civil Service Acts were passed.

Chollar v. *United States*, 126 F. Supp. 448. Thus, in suspending the application of those Acts to

Department of Commerce employees, Section 304 merely represented a temporary return to the former rule under which the appointing authority could summarily dismiss an employee "in his absolute discretion," but conditioned this power on the Secretary's finding such termination "necessary or advisable in the best interests of the United States." The constitutionality of such a provision would appear too plain for doubt. Particularly is this so in the instant case where, as the court below noted, petitioner's "discharge carries no implication that he might be either disloyal or a security risk." Pet. App. 12, n. 2. Compare *Bailey* v. *Richardson*, 86 App. D.C. 248, 182 F. 2d 46, affirmed by an equally divided court, 341 U.S. 918, and *Peters* v. *Hobby*, 349 U.S. 331.

3. Since petitioner had no statutory or constitutional right to any procedures other than those followed in this case, the action of respondent in terminating petitioner's employment is not subject to judicial review. For even where an employee has such a right, judicial review is limited to a determination of whether there has been " 'substantial compliance' with [the] procedural requirements [laid down by statute or regulation] * * * 'the courts have uniformly held that the administrative determination by the employing agency of what constitutes cause for discharge will not be judicially reviewed.' " *Williams* v. *Cravens*, 210 F. 2d 874 (C.A.D.C.), certiorari denied, 348 U.S. 819; *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290. Thus, where

an employee is dismissed on charges of which he is subsequently shown to be innocent, "the action of the executive officers is not subject to revision in the courts" so long as "the things required by law and regulations, were done, and the discretion of the authorized officers was exercised as required by law." *Eberlein* v. *United States*, 257 U.S. 82, 84. See also *Levy* v. *Woods*, 171 F. 2d 145, 146 (C.A. D.C.).

Despite these repeated holdings, petitioner insists that respondent's action in discharging him is nevertheless reviewable. Petitioner relies (Pet. 8) on *Gadsden* v. *United States*, 111 C. Cls. 487. But the Court of Claims there held only that, where an employee (unlike petitioner) is entitled to the benefits of the Lloyd-LaFollette Act prohibition against dismissal "except for such cause as will promote the efficiency of [the] service," the court could determine whether the administrative officer acted in good faith, even though it had no jurisdiction to substitute its own judgment for that of the administrative officer in determining whether or not the employee's discharge would in fact promote the efficiency of the Government service. 111 C. Cls. at 489. Under this rule, the Court of Claims has overturned the action of the administrative officer only where it has found that the employee was not in fact removed for the good of the service but because the administrative officer was motivated by malice. *Knotts* v. *United States*, 128 C. Cls. 489, 490; *Gadsden* v. *United States, supra*; cf. *Elchibegoff* v. *United States*, 123 C. Cls. 709, 713.

Here, petitioner does not suggest that the Secretary of Commerce was motivated by malice. He appears instead to claim (Pet. 6-7) that respondent was mistaken in deeming petitioner's discharge to be "necessary or advisable in the best interests of the United States" and, being mistaken, was therefore "arbitrary and unreasonable." Petitioner is thus asking this Court to exercise a jurisdiction which all three courts—this Court, the court below, and the Court of Claims—have consistently denied they possess, *i.e.*, to review an administrative determination of what constitutes cause for removal. *Gadsden* v. *United States*, *supra*, at 489, and cases there cited. Far from being in conflict, the decision below is wholly in accord with the *Gadsden* decision.[4]

4. The question presented, moreover, is no longer of general applicability. The statute under which petitioner was discharged, Section 304 of Public

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[4] Furthermore, as already noted, the Lloyd-LaFollette Act prohibition against dismissal "except for such cause as will promote the efficiency of [the] service" was removed by the statute here in question. There is consequently no occasion to determine whether the Secretary's action was motivated by a desire to "promote the efficiency of the service." And the express terms of Section 304 preclude a review of the Secretary's determination that petitioner's discharge was "necessary or advisable in the best interests of the United States." Section 304 authorized summary dismissal whenever "*he* [the Secretary of Commerce] shall deem such termination necessary or advisable * * *" (emphasis added). This determination was committed to the Secretary's "absolute discretion." Accordingly, even if it be assumed *arguendo* that the Secretary was in error in reaching his decision, judicial intervention to review respondent's determination is precluded by the express mandate of Congress.

Law 495 of the 82nd Congress, expired three years ago. Only one other case involving a similar statutory provision is currently pending in the lower courts, and new suits brought at this time would be barred by laches. Cf. *Norris* v. *United States*, 257 U.S. 77; *Grasse* v. *Snyder*, 192 F. 2d 35 (C.A. D.C.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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